A **DESA SAMUDRA SDN BHD**

v.

BANDAR TEKNIK SDN BHD & ORS

B FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
[CIVIL APPEAL NO: 02( )-9-2011 (W)]
C 14 DECEMBER 2011

CONTRACT: *Building contract - Termination - Contractor petitioned court under s. 176(1) Companies Act 1965 for approval of scheme of composition with creditors - Whether cl. 25(2) PAM Standard Form*
D *Building Contract of Malaysia triggered causing automatic termination of main contract - Issuance of moratorium order under s. 176(10) Companies Act 1965 - Whether activated cl. 25(2) PAM Standard Form Building Contract*

E ***TORT:*** *Trespass - Liability of - Claim for trespass and conversion - Removal of materials from site - Whether main contractor had authority to give consent to respondents to do so - Whether PAM Building Contract automatically terminated - Whether legal possession remained with main contractor as PAM Building Contract not validly terminated*

F ***CONTRACT:*** *Oral agreement - Admissibility of evidence - Disputed document - Admissibility of Minutes of Meeting showing appellant agreeing to make direct payments to subcontractors - Whether Minutes part of agreed bundle of documents - Whether Court of Appeal erred in referring to the Minutes - Whether there was legally binding relationship*
G *between appellant and respondents - Whether plaintiff estopped from asserting there was no such contract*

The appellant was the owner of Wisma E&C, an office building in Damansara Heights. One Autoways Constructions Sdn Bhd
H ("Autoways") was engaged as main contractor under a PAM Building Contract to construct the office building. The respondents herein were subcontractors appointed by Autoways to perform various functions under the project. The crux of the case surrounded cl. 25(2) of the PAM Building Contract which
I provides for automatic termination of the contract upon the main contractor 'making a composition or arrangement with his

creditors.' In this respect, a termination letter was issued by the appellant upon learning that Autoways had made an application to the court under s. 176 of the Companies Act 1965. Autoways thus vacated the site and reverted possession back to the appellant. On the authorisation of Autoways, the respondents had re-entered the site without giving notice to the appellant and had removed equipment and goods, and in the process damaged the building. The appellant sued the subcontractors in trespass and conversion. The subcontractors in response filed a counterclaim for individual sums owing to them directly by the appellant based on an alleged oral contract. The High Court found the subcontractors to be liable and dismissed the counterclaim by the subcontractors. The Court of Appeal reversed the High Court's decision and held that the contract between the appellant and Autoways was not validly terminated, and that Autoways remained the main contractor and could give consent to the respondents to enter the site, thus there was no trespass or conversion by the respondents. The Court of Appeal proceeded to dismiss the appellant's claim and allowed the respondents' counterclaim with costs. The appellant thus appealed. With leave of this court, the following questions were posed, *inter alia* (i) whether cl. 25(2) of the PAM Standard Form Building Contract of Malaysia was triggered causing an automatic termination of the main contract if the contractor petitioned the court under s. 176(1) of the Companies Act 1965 for approval of a scheme of composition with its creditors; (ii) whether the issuance of an order under s. 176(10) of the Companies Act would activate cl. 25(2) of the PAM Contract; (iii) whether under the PAM Standard Form Building Contract possession of a project site reverted back to the employer regardless of whether the termination of the contract was disputed by the main contractor and (iv) whether the Court of Appeal could judicially base its decision on a disputed document that was not admitted into evidence by the trial judge.

Held (dismissing the appeal)
Per Richard Malanjum CJ (Sabah & Sarawak):

(1) The appellant's contention strongly hinged upon the words "making a composition or arrangement with his creditors" as stipulated in cl. 25(2). Although the word "making" was used, it must for all necessary purposes be read as the composition or arrangement had been made. It was not the intention of the PAM Building Contract to automatically terminate

contracts whereby the main contractor possibly had financial difficulties. If indeed the PAM Building Contract Agreement intended to cover such situations, it must state so expressly. The presentation of a proposal of a scheme of composition or arrangement to the court was not by itself sufficient to activate cl. 25(2). Clause 25(2) would only be activated when the court is called upon to approve the composition or arrangement as provided for under s. 176(3). Unless and until that event happens, cl. 25(2) has no application. (paras 23, 24, 26 & 28)

(2) The obtaining of a moratorium order under s. 176(10) did not fall within the ambit of the "making a composition or arrangement with his creditors." The events mentioned in cl. 25(2) are essentially instances of insolvency. An application (and also the granting of the same) under s. 176(10) is not an instance of insolvency. It may for all necessary purposes be that insolvency is probable or imminent, but at the stage of such an application, the main contractor could not be said to be insolvent. Thus, the granting of a moratorium order under s. 176(1) did not activate cl. 25(2). (para 19)

(3) As to whether Autoways had the authority to give consent to the respondents to remove their materials from the site after the PAM contract had been terminated, it was this court's view that whether or not Autoways had the authority to do so would depend on whether the PAM Contract had been validly terminated or otherwise. It followed that the PAM Contract had not been automatically terminated and thus Autoways had the authority to give the said consent to the respondents. Hence, there was no question of trespass or conversion by the respondents. The appellant did physically have possession of the site (possession in fact). However, legal possession remained with Autoways because the PAM Contract was not validly terminated (possession in law). (paras 30 & 31)

(4) The appellant disputed the Minutes of Meeting dated 14 April 1998 whereby it was allegedly agreed that the appellant would make direct payments to the subcontractors to continue with the outstanding works on the site. It was the appellant's stand that the said Minutes was not tendered in evidence. However,

it was found that the said Minutes were part of the Agreed Bundle of Documents and were indeed referred to extensively by the parties. At no point did the learned trial judge rule that the said Minutes were inadmissible. The Court of Appeal did not commit any error in referring to the said Minutes in arriving at its decision. Indeed, the overwhelming contemporaneous evidence as pointed out by the Court of Appeal such as the fact that there had been payment on two previous occasions after the meeting showed that there was an oral contract for direct payment to be made by the appellant to the subcontractors. Indeed, there being a legally binding relationship between the appellant and the respondents, the appellant must be estopped from asserting that there was no such oral contract. The respondents were entitled to succeed in their counterclaim. (paras 43 & 46)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah pemilik Wisma E&C, sebuah bangunan pejabat di Damansara Heights. Autoways Construction Sdn Bhd ("Autoways") telah menjadi kontraktor utama di bawah Kontrak Bangunan PAM untuk membina bangunan pejabat. Responden-responden di sini adalah subkontraktor-subkontraktor yang dilantik oleh Autoways untuk melaksanakan pelbagai fungsi di bawah projek. Teras kes ini adalah mengenai kl. 25(2) Kontrak Bangunan PAM yang menyediakan peruntukan bagi penamatan automatik kontrak apabila kontraktor utama 'membuat suatu komposisi atau susunan dengan pemiutangnya'. Dalam hal ini, surat penamatan telah dikeluarkan oleh perayu apabila didapati bahawa Autoways telah membuat permohonan kepada mahkamah di bawah s. 176 Akta Syarikat 1965. Autoways telah berundur dari tapak tersebut dan mengembalikan semula milikan kepada perayu. Atas pemberian kuasa Autoways, responden-responden telah memasuki balik tapak itu tanpa memberi notis kepada perayu dan telah mengeluarkan peralatan dan barang-barangan, dan dalam proses telah merosakkan bangunan. Perayu telah saman subkontraktor-subkontraktor dalam pencerobohan dan penukaran. Subkontraktor-subkontraktor, sebagai tindak balas, memfailkan rayuan balas untuk jumlah-jumlah yang terhutang secara individu kepada mereka oleh perayu berdasarkan kontrak lisan yang didakwa telah dibuat. Mahkamah Tinggi mendapati subkontraktor-subkontraktor adalah bertanggungjawab dan menolak rayuan balas subkontraktor-

A subkontraktor. Mahkamah Rayuan telah mengakas keputusan Mahkamah Tinggi dan memutuskan bahawa penamatan kontrak di antara perayu dan Autoways tidak sah, dan Autoways kekal sebagai kontraktor utama dan mempunyai kuasa untuk membenarkan responden-responden untuk memasuki tapak, oleh
B itu tiada pencerobohan dan penukaran dilakukan oleh responden-responden. Mahkamah Rayuan terus menolak tuntutan perayu dan membenarkan rayuan balas responden dengan kos. Dengan itu, perayu merayu. Dengan kebenaran mahkamah ini, soalan-soalan berikut telah ditimbulkan, antara lain (i) sama ada kl. 25(2)
C Standard Borang Kontrak Bangunan PAM Malaysia tercetus menyebabkan penamatan automatik kontrak utama jika kontraktor telah membuat petisyen ke mahkamah di bawah s. 176(1) Akta Syarikat 1965 bagi kelulusan skema komposisi dengan pemiutang-pemiutangnya; (ii) sama ada pengeluaran suatu perintah di bawah
D s. 176(10) Akta Syarikat akan mengaktifkan kl. 25(2) kontrak PAM; (iii) sama ada di bawah Standard Borang Kontrak Bangunan PAM pemilikan tapak projek dikembalikan semula kepada majikan tanpa mengira sama ada penamatan kontrak dipertikaikan oleh kontraktor utama dan (iv) sama ada Mahkamah Rayuan boleh
E secara kehakiman membuat keputusan berdasarkan dokumen yang dipertikaikan tidak diterima-masuk sebagai keterangan oleh hakim bicara.

Diputuskan (menolak rayuan)

F **Oleh Richard Malanjum HB (Sabah & Sarawak):**

(1) Hujahan perayu bergantung kuat pada perkataan-perkataan 'membuat suatu komposisi atau susunan dengan pemiutang-pemiutangnya' seperti yang ditetapkan oleh kl. 25(2).Walaupun
G perkataan 'membuat' digunakan, ia mesti untuk semua tujuan perlu dibaca sebagai komposisi atau susunan telahpun dibuat. Ia bukan niat Kontrak Bangunan PAM untuk menamatkan secara automatik kontrak-kontrak di mana kontraktor utama mungkin mempunyai masalah kewangan. Jika benar Kontrak
H Bangunan PAM bertujuan untuk meliputi keadaan-keadaan seperti itu, ia harus dinyatakan dengan terang dan nyata. Pembentangan cadangan skema komposisi atau susunan ke mahkamah tidak dengan sendirinya mencukupi untuk mengaktifkan kl. 25(2). Klausa 25(2) hanya boleh diaktifkan
I apabila mahkamah dipanggil untuk meluluskan komposisi dan susunan seperti yang diperuntukkan di bawah s. 176(3). Melainkan dan sehingga perkara itu berlaku, kl. 25(2) tidak digunapakai.

(2) Mendapatkan perintah moratorium di bawah s. 176(10) tidak termasuk di dalam skop 'membuat komposisi dan susunan dengan pemiutang-pemiutang'. Peristiwa-peristiwa yang disebut di dalam k. 25(2) pada dasarnya keadaan-keadaan insolvensi. Permohonan (dan membenarkannya) di bawah s. 176(10) bukan keadaan insolvensi. Ia mungkin bagi semua tujuan dan maksud yang perlu bahawa ketaksolvenan adalah berkemungkinan dan akan berlaku, tetapi pada peringkat permohonan seperti itu, kontraktor utama tidak boleh dikatakan tak solven. Oleh itu, pemberian suatu perintah moratorium di bawah s. 176(1) tidak mengaktifkan kl. 25(2).

(3) Mengenai sama ada Autoways mempunyai kuasa untuk mengizinkan responden-responden mengambil barang-barang mereka dari tapak tersebut selepas kontrak PAM telah ditamatkan, ia adalah pandangan mahkamah ini bahawa sama ada Autoways mempunyai kuasa berbuat demikian bergantung kepada sama ada kontrak PAM telah ditamatkan dengan sah atau tidak. Boleh disimpulkan bahawa kontrak PAM tidak ditamatkan secara automatik dan oleh itu Autoways mempunyai kuasa untuk memberi keizinan kepada responden-responden. Oleh itu, tidak ada soalan pencerobohan atau penukaran oleh responden-responden. Perayu mempunyai milikan fizikal ke atas tapak tersebut (milikan sebenar). Walau bagaimanapun, milikan undang-undang kekal dengan Autoways kerana kontrak PAM tidak sah ditamatkan (milikan di sisi undang-undang).

(4) Perayu mempertikaikan minit mesyuarat bertarikh 14 April 1998 di mana ia didakwa satu persetujuan telah dibuat untuk perayu membuat bayaran terus kepada subkontraktor-subkontraktor untuk meneruskan kerja-kerja tertunggak di tapak tersebut. Ia adalah pendirian perayu bahawa minit tersebut tidak dikemukakan sebagai keterangan. Walau bagaimanapun, didapati bahawa minit tersebut adalah sebahagian dari Ikatan Dokumen Yang Telah Dipersetujui dan telah dirujuk dengan meluas oleh pihak-pihak terlibat. Tidak pada satu titik pun yang arif hakim bicara telah memutuskan bahawa minit tersebut tidak boleh diterima. Mahkamah Rayuan tidak khilaf apabila merujuk kepada minit tersebut dalam membuat keputusan. Sesungguhnya, keterangan kontemporari yang cukup banyak seperti yang ditegaskan oleh Mahkamah Rayuan seperti terdapat dua bayaran yang dibuat sebelum ini

selepas mesyuarat menunjukkan bahawa terdapat kontrak lisan untuk bayaran terus dibuat oleh perayu kepada subkontraktor-subkontraktor. Sesungguhnya, dengan wujudnya satu perhubungan mengikat secara sah di antara perayu dan responden-responden, perayu harus diestop dari menegaskan bahawa tidak terdapat kontrak lisan. Responden-responden harus berjaya di dalam rayuan balas mereka.

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Autoways Constructions Sdn Bhd lwn. Desa Samudra Sdn Bhd & Anor [1999] 4 CLJ 601 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Desa Samudra Sdn Bhd v. Autoways Construction Sdn Bhd & Ors; Another Case [2009] 1 LNS 298 HC ***(refd)***

JKP Sdn Bhd v. PPH Development (M) Sdn Bhd [2007] 3 CLJ 621 CA ***(refd)***

Lyle-Meller v. A Lewis & Co (Westminster) Ltd [1956] 1 All ER 247 ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

New Zealand Insurance Co Ltd v. Sinnadorai [1969] 1 LNS 119 FC ***(refd)***

Shaikh Sahied bin Talip bin Jaafar bin Talip v. Khoo Kang Chek [1931] 1 LNS 29 HC ***(refd)***

Sinnadorai v. New Zealand Insurance Company Ltd [1968] 1 LNS 144 HC ***(refd)***

Television Broadcasts Ltd & Ors v. Golden Line Video & Anor [1989] 1 CLJ 589; [1989] 2 CLJ (Rep) 1099 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 176(1), (10)

For the appellant - Dato' Cyrus Das (RM Krishnan & Harvinderjit Singh with him); M/s Kumar Partnership

For the respondents - Datuk N Chandran (Mahendran Chelliah & Ranjan Chandran with him); M/s RR Chelliah Brothers

[Appeal from Court of Appeal, Civil Appeal No: W-02-1094-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] With leave of this court granted on 21 February 2011, the following questions are posed before us for our consideration, namely:

(1) Whether cl. 25(2) of the PAM Standard Form Building Contract of Malaysia is triggered, causing an automatic termination of the main contract if the Contractor petitions the court under s. 176(1) of the Companies Act 1965 for approval of a scheme of composition with its creditors?

(2) Whether a restraining or moratorium order issued by the court under s. 176(10) of the Companies Act 1965 in favour of the Contractor is proof of 'making of a composition or arrangement with creditors for the purpose of cl. 25(2) of the PAM Building Contract?

(3) Whether under the PAM Standard Form Building Contract, possession of a project site reverts back to the employer regardless of whether the termination of the contract is disputed by the main contractor?

(4) Upon the project site reverting to the employer, could the main contractor under the PAM Contract consider itself released from the terms of the contract and/or authorize the Sub-Contractors to enter upon the site and remove goods and materials without the consent of the employer or the project Architect?

(5) Whether the torts of conversion and trespass to goods committed by several tortfeasors attract liability on a joint and several basis for the total value of the goods or materials that are the subject matter of trespass and conversion?

(6) Whether the Court of Appeal could judicially base its decision on a disputed document that was not admitted into evidence by the trial court?

[2] We heard learned counsel for the parties and reserved our decision. Having given the arguments submitted our anxious consideration we now deliver our decision.

Background

[3] Briefly, the facts surrounding the case have been thoroughly elucidated by the High Court and the said judgment can be found at [2009] 1 LNS 298. The Court of Appeal in its broad grounds of reasons did not repeat the facts of the case with great detail. We propose to do the same and highlight only the relevant and pertinent facts for the purposes of this appeal.

[4] The appellant herein is the owner of Wisma E & C which is an office building located in Damansara Heights. One Autoways Constructions Sdn. Bhd. ("Autoways") was engaged as the main contractor under a PAM Building Contract to construct the said office building. The appellant was the employer. Autoways was originally named as the first defendant in the court of first instance, but as it had already been wound up, it did not participate at the trial.

[5] The respondents on the other hand are subcontractors appointed by Autoways to perform various functions under the project. The individuals named as respondents, namely the 2nd and 4th respondents, are principals of the respective sub-contractors. The 5th and 6th respondents are related to the counterclaim only.

[6] The crux of the case surrounds cl. 25(2) of the RAM Building Contract which provides for automatic termination of the contract upon the happening of certain events. The pertinent event is the main contractor "making a composition or arrangement with his creditors". In this respect, a termination letter dated 26 June 1998 was issued by the appellant upon learning that Autoways made an application to the court under s. 176 of the Companies Act 1965.

[7] Autoways maintained that it disputed the right of the appellant to invoke cl. 25(2) but nevertheless vacated the site and reverted possession back to the appellant.

[8] The present dispute arose from events which occurred on 2 August 1998. On the authorization of Autoways, the first to fourth respondents (as subcontractors and their principal officials) re-entered the site without giving notice to the appellant or the Architect and removed plants, tools, equipment and goods, and in the process damaged or destroyed temporary buildings by stripping off mechanical and electrical installations.

[9] Premised on that, the appellant sued the sub-contractors in trespass and conversion for RM695,000. The subcontractors in response filed a counter-claim for individual sums owing to them directly by the appellant based on an alleged oral contract said to be made at a meeting on 14 April 1998. In essence, the alleged oral contract effectively stipulates that the appellant had undertaken to pay the sub-contractors whatever sums owed to them by Autoways as a result of the latter's financial difficulties.

[10] The High Court on 6 May 2009 found that as the PAM Building Contract was validly terminated under cl. 25(2) of the same read together with s. 176(10) of the Companies Act, Autoways had ceased to be the main contractor and could not have validly given consent to the sub-contractors to enter the site. Hence, the High Court found the sub-contractors to be liable for trespass and conversion, but could not award damages because the appellant had failed to prove which sub-contractor did and took what. The counter-claim brought by the sub-contractors was also dismissed on the ground that the alleged oral contract for direct payment made on 14 April 1998 was not proven on the balance of probabilities. In short, both the claim and counter-claim were dismissed with costs. As such, both parties appealed.

[11] The Court of Appeal on 2 September 2010 reversed the High Court's decision on several grounds. First, the Court of Appeal was of the view that obtaining a moratorium order under s. 176(10) of the Companies Act did not activate the automatic termination of the PAM Building Contract, and as such the contract between the appellant and Autoways was not validly terminated. It followed that by reason thereof, Autoways remained the main contractor and could validly give consent to the respondents to enter the site, and accordingly there was no trespass and conversion by the respondents. The Court of Appeal also found that the respondents had successfully established the existence of an oral contract made on 14 April 1998 whereby a binding obligation was created for direct payment to be made to the respondents to continue and complete the pending works. The Court of Appeal proceeded to dismiss the appellant's claim for trespass and conversion, and allowed the respondent's counterclaim with costs.

A

Our Decision

[12] For the reasons below, we would dismiss this appeal with costs and affirm the decision of the Court of Appeal.

B

Reasons

[13] Due to the fact that they are closely related, we shall answer Questions 1 and 2 together and so too Questions 3 and 4 since they are essentially related to the PAM Building Contract. Questions 5 and 6 are standalone questions respectively.

C

Questions 1 And 2 – Effect Of s. 176 Of The Companies Act

[14] This is perhaps the most crucial question raised by the appellant which begs an answer. It is essentially the effect which ss. 176(1) and 176(10) of the Companies Act 1965 has in relation to cl. 25(2) of the PAM Building Contract.

D

[15] Now, s. 176(1) states the following:

> Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

E

F

[16] And s. 176(10) stipulates as below:

> Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

G

H

[17] The material part of cl. 25(2) of the PAM Building Contract is termed as follows:

I

> In the event of the Contractor becoming a bankrupt or making a composition or arrangement with his creditors or having a winding up order made ... the employment of the Contractor under this Contract shall be forthwith automatically determined but the said employment may be reinstated and continued if the Employer and Contractor his trustee in bankruptcy liquidator receiver or manager as the case may be shall so agree.

[18] We will deal with the second question first, ie, the effect of s. 176(10) because it would help narrow down the broad scope of discussion under the first question. The sole point for consideration on this question is whether the issuance an order under the s. 176(10) of the Companies Act 1965 would activate cl. 25(2) of the PAM Contract. Although compelling at first glance, we respectfully do not agree with the appellant's stand. We accordingly find that the granting of a moratorium order under s. 176(10) does not activate cl. 25(2).

[19] Our simple rationale for this is that the events mentioned in cl. 25(2) are essentially instances of insolvency. An application (and also the granting of the same) under s. 176(10) is not an instance of insolvency. It may for all necessary purposes be that insolvency is probable or imminent, but at the stage of such an application, the main contractor cannot be said to be insolvent. It should be borne in mind that there have been instances where companies have bounced back after being granted s. 176(10) orders – some make it whereas others do not.

[20] In short, s. 176(10) does not have any bearing on cl. 25(2). This brings us to the first question which deals with s. 176(1). Now, it is pertinent to note that a moratorium order under s. 176(10) was in actual fact obtained. However, no compromise or arrangement had been agreed upon and approved by the court as per the other provisions of s. 176.

[21] Now, the appellant's contention strongly hinges upon the words "making a composition or arrangement with his creditors" as stipulated in cl. 25(2). The appellant argues by reason of the usage of the word "making", it was intended that a composition or arrangement need not necessarily be made. In other words, a proposal to enter into the same would suffice. The High Court was in agreement with that interpretation. The Court of Appeal disagreed.

[22] Having considered all the arguments we are in agreement with the approach by the Court of Appeal. It is a matter of interpretation of the phrase: "making a composition or arrangement with his creditors". For instance, the words 'the making of the article ...' was given the grammatical construction of 'the actual making of the article' and not otherwise. (See: *Television Broadcasts Ltd & Ors v. Golden Line Video & Anor* [1989] 1 CLJ 589; [1989] 2 CLJ (Rep) 1099 (also [1988] SLR 930).

[23] Hence, we are of the view that although the word "making" is used, it must for all necessary purposes be read as the composition or arrangement has been made. In other words it must necessarily be a step further than a mere proposal to enter into composition or arrangement. It is akin to provisions where words such as "upon the entering of a judgment" or "upon the happening of an event" – whereby the judgment has to be entered or the event has to happen before it could be said that the provision has been activated.

[24] We do not think that the PAM Building Contract intends to automatically terminate contracts whereby the main contractor possibly has financial difficulties. If indeed the PAM Building Contract Agreement intends to cover such situations, it must state so expressly. After all proposals of schemes of composition or arrangements do not necessarily materialize at all times.

[25] We find further support in our view by the words adopted in cl. 25(2) itself, ie, "but the said employment may be reinstated and continued if the employer and contractor **his trustee in bankruptcy liquidator receiver or manager** as the case may be shall so agree" (emphasis added) also leads us to conclude that cl. 25(2) seemingly comes into play only upon the happening of the event and not in the process of it. Those persons or bodies mentioned in the emphasis highlighted above would be where the event has actually happened.

[26] Indeed cl. 25(2) also uses the words "becoming a bankrupt" and also "having a winding up order made". It is beyond doubt that the said clause intends for the bankruptcy orders to have been entered or the winding order to have been made. That to our mind is akin to "making a composition or arrangement with his creditors". The words "becoming", "making" and "having" are of the similar grammatical tense, namely present tense (or perhaps

even present continuous tense). We find no merit in the appellant's argument that the usage of the present tense would result in the interpretation of cl. 25(2) read together with s. 176.

[27] Thus, with respect, we are inclined to disagree with the conclusion arrived at by the High Court in an earlier case involving the similar parties, ie, *Autoways Constructions Sdn Bhd lwn. Desa Samudra Sdn Bhd & Anor* [1999] 4 CLJ 601. Instead, we prefer to follow the approach adopted by the High Court in *Sinnadorai v. New Zealand Insurance Company Ltd* [1968] 1 LNS 144. When dealing with a similar provision the learned judge there concluded that such a provision is only activated once the event has happened. No doubt the decision in that case was reversed by the then Federal Court but it was on a different ground altogether. (See: *New Zealand Insurance Co Ltd v. Sinnadorai* [1969] 1 LNS 119). In other words, the then Federal Court did not disapprove the interpretation of the said provision by the learned judge. We would therefore for practical reasons adopt such an interpretation.

[28] Accordingly, we are of the view that the obtaining of a moratorium order under s. 176(10) does not fall within the ambit of the "making a composition or arrangement with his creditors". Similarly, the presentation of a proposal of a scheme of composition or arrangement to the court is not by itself sufficient to activate cl. 25(2). Clause 25(2) is only activated when the court is called upon to approve the composition or arrangement as provided for under s. 176(3). Unless and until that event happens, cl. 25(2) has no application.

Questions 3 And 4 – Project Site Reverting Back Upon Termination

[29] Our simple answer to Question 3 is that it would necessarily depend on the validity of the termination. No doubt the general rule is that termination of the PAM Building Contract would result in the project site reverting back to the employer. However, if indeed the termination was unlawful and/or unjustified, an exception to the general rule would arise.

[30] In the present case the question is whether Autoways had the authority to give consent to the respondents to remove their materials from the site after the PAM Contract has been

terminated. It is our considered view that whether or not Autoways had the authority to do so would depend on whether the PAM Contract had been validly terminated or otherwise. As a consequence of the answers to the first two questions posed, it follows that the PAM Contract had not been automatically terminated and thus Autoways had the authority to give the said consent to the respondents. Hence, there is no question of trespass or conversion by the respondents. As such, question 4 does not arise and there is no need for us to address the same.

[31] We find it necessary to add a few words to this scenario. We are of the opinion that a distinction ought to be drawn between 'possession in fact' and 'possession in law'. We accept that "possession" can be broadly divided into possession in fact (physical control) and possession in law (legal control) (see: generally *Shaikh Sahied bin Talip bin Jaafar bin Talip v. Khoo Kang Chek* [1931] 1 LNS 29 where the court (Simpson J) observed that – "Possession is primarily divisible into possession in fact (physical control) and possession in law"). What we mean to say is that although the Main Contractor may not have possession in fact, it may still retain possession in law. Applying it to the present situation, it is not in dispute that Autoways did in actual fact vacate the site. Hence, the appellant did indeed take over the site upon the said termination. Accordingly, the appellant did physically have possession of the site – this is what we mean by possession in fact. However, legal possession remained with Autoways because the PAM Contract was not validly terminated – this is what we mean by possession in law.

[32] Hence, we find ourselves in agreement with the views of Professor Vincent Powell-Smith in The Malaysian Standard Form of Building Contract – PAM 1969 where he opined that "Although there is no express provision that on determination the contractor must give up possession of the site, it is suggested that he is bound to do so, even if he is disputing the grounds or validity of the determination". That, to our mind, is with reference to the physical possession of the site – ie, possession in fact. We add that even though the contractor has surrendered possession of the site back to the employer, that by itself does not affect the position that the contractor may still have possession in law – the latter situation being dependant on whether the contract was validly terminated in the first place.

Question 5

[33] This question deals with the liability of joint tortfeasors towards the total value of the subject matter where trespass or conversion has been established. Now, in this case we have already found that neither trespass nor conversion has been established. Thus, this issue need not be addressed. However, this question raises general importance and thus we feel obliged to say a few words on this subject matter.

[34] We accept that joint tortfeasors may be jointly and severally liable for the total amount of the subject matter where a tort action has successfully been established. But that itself would necessarily depend on the facts and circumstances of the case. It is very much a factual issue. We would therefore decline to lay down a hard and fast rule for this. But it is for the court to consider whether or not the acts of tort are said to be indivisible. (See: *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1).

[35] Even assuming that this issue is still relevant in this case we find that in the present circumstances each of the sub contractors (including the respondents) would have only taken their respective materials out of the site. It would be a grave injustice to hold them for materials taken out by other sub contractors or damage and injuries caused by them. In short, we are of the view that the facts of the present case do not justify imputing full liability on the respondents for the damage and injury which had been caused jointly by the acts of the sub contractors on that day.

Question 6 – Status Of Document Not Admitted In Evidence

[36] This question relates to an important evidential and procedural issue. It also has crucial bearing in the determination of this appeal. In the event that we are wrong in our findings with regard to s. 176 of the Companies Act and cl. 25(2) of the PAM Building Contract, we are of the view that the appeal should be dismissed on this ground. This ground is the cross appeal raised by the respondents in the Court of Appeal which was allowed.

[37] The general rule is that document not admitted in evidence by the trial court should not be relied upon by an appellate court. The appropriate approach when dealing with a situation where the ground for appeal is that a document was wrongfully rejected by

A the trial court would be for the appellate court to rule on its admissibility and if found to be favourable, to order the matter to be remitted back for trial and that the document be admitted before the trial court and subjected to cross-examination. Of course, there are instances where an appellate court may consider
B new evidence not raised at trial – but that is a different matter altogether and of no concern here.

[38] However, in the present case the question posed by the appellant does not reflect the actual position of the document in
C dispute. The document in question is the minutes of meeting dated 14 April 1998, whereby it was allegedly agreed that the appellant would make direct payment to the sub contractors to continue with the outstanding works on the site.

D **[39]** The appellant seems to take the stand that the said minutes was not tendered in evidence (and hence the manner in which the question was posed). The respondents on the other hand argued that the said minutes in actual fact formed part of the agreed bundle at trial and was in fact extensively referred to by the
E parties at trial as D 9-12. The respondents acknowledge that at trial, the appellant did object to the said minutes, but that the court merely noted down the objection and proceeded. At no point was it ruled that the said minutes were inadmissible. Parties continued to refer to the minutes thereafter.

F **[40]** We therefore agree with the respondents' argument. In the law governing documentary evidence, as in oral evidence, three matters come to mind – relevancy, admissibility, and weight. They must be considered in that order. Only evidence which is relevant ought to be admissible. Irrelevant evidence should be rendered as
G inadmissible and the matter ends there. Now, relevant evidence which is rendered admissible is still subject to the element of weight. The court can either attach due weight to the evidence, or some weight, little weight, or no weight at all. Due regard must be given to the authenticity of the evidence, its source, its
H contents, and more importantly, the surrounding circumstances of the case. This is where contemporaneous evidence would come in handy.

[41] Having considered the circumstances of the case, we are of
I the view that the said minutes were part of the agreed bundle of documents and were indeed referred to extensively by the parties. An objection was raised and noted at the outset, but at no point

did the learned trial judge rule that the said minutes were inadmissible. The mere fact that a document is disputed or objected to does not by itself render the document inadmissible. Parties continued to refer to the minutes at trial as D9-12. Hence, the appellant's approach to the question posed is a non-starter in actual fact.

[42] To our mind, the only issue in question is the weight that ought to be attached to the said minutes. And in arriving at this juncture, we state for the record that we are of the view that the Court of Appeal did not commit any error in referring to the said minutes in arriving at its decision. The Court of Appeal did not (as the appellant seems to portray) refer to evidence which had been ruled as inadmissible and render it admissible, and base its decision on the same. All it did was to attach due weight to the said minutes. We are of the view that appellate courts are perfectly entitled to do the same. (See: *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1; *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1; and *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163).

[43] Indeed, the overwhelming contemporaneous evidence as pointed out by the Court of Appeal such as the fact that there had been payment on two previous occasions after the meeting goes to show that indeed there was an oral contract for direct payment to be made by the appellant to the sub contractors. Indeed, there being a legally binding relationship between the appellant and the respondents (see: *Lyle-Meller v. A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247), the appellant must be estopped from asserting that there was no such oral contract. (See: *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283).

[44] In any event, even if the minutes were not considered in evidence, we are of the view that there was sufficient oral evidence raised at trial to show that there was indeed an oral agreement to the effect as alluded to above.

[45] Accordingly, we find that there was an oral contract between the parties to the present appeal whereby the respondents were induced to perform and complete the works. This is not only established by the said minutes but by other

A contemporaneous evidence and also circumstantial evidence. We also note and endorse the approach taken by the Court of Appeal in *JKP Sdn Bhd v. PPH Development (M) Sdn Bhd* [2007] 3 CLJ 621 whereby a slightly similar situation occurred.

B **Conclusion**

[46] Accordingly, we are of the view that the PAM Building Contract was not automatically terminated by reason of the existence of a proposed scheme of composition or arrangement or by the granting of a moratorium order under s. 176 of the
C Companies Act. As such, the main contractor was legally authorized to give consent to the sub contractors to remove the latter's materials from the site and as such the appellant's action in trespass and conversion cannot sustain. As for the respondents'
D claim, we are of the view that there was an agreement between the appellant and the respondents that the former would make direct payment to the latter to complete the works. The appellant's breach of this agreement towards the tail end of the project entitled the respondents to succeed in their counter-claim.

E **[47]** We accordingly find no reason to disagree with the findings and decision of the Court of Appeal. Therefore, this appeal is dismissed with costs.

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